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U.S. Citizenship
and Immigration
Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 29 2009

SRC 07 800 14994

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral research associate at Indiana University School of Medicine, Indianapolis. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

Several witness letters described the petitioner's past and present work. The petitioner earned his doctorate at the University of South Dakota, under the direction of A[redacted], Jr., who stated:

> [The petitioner's] performance in the laboratory was extraordinary and he made some important scientific discoveries that gained national interest . . . .

> [The petitioner's] work has been directed at understanding the underlying mechanisms of blood pressure control and in the treatment of hypertension (i.e., dysregulated blood pressure) . . . .
>
> Diuretic agents are first-line antihypertensive drugs . . . . There is recent interest in the development of adenosine receptor antagonists as a novel class of diuretic agents that do not cause loss of potassium or reductions of renal blood flow. [The petitioner's] work illustrated the use of such a compound in combination with other diuretic agents as a potential antihypertensive regimen . . . . [H]is work generated wide-spread interest from well-respected renal physiologists within academic institutions as well as the pharmaceutical industry . . . .
>
> Over the last year, [the petitioner] has designed and carried out novel studies to determine the role of nitric oxide in the development of hypertension. He has provided interesting and important findings regarding the interaction of nitric oxide with another important hormone, aldosterone . . . . [The petitioner's] work demonstrates that aldosterone-induced hypertension is worsened in conditions where nitric oxide production is impaired. These important findings help to elucidate mechanisms of hypertension development secondary to primary aldosteronism with endothelial impairment, as occurs in diabetes.

[redacted]g, who was "in the same research group" as the petitioner at the University of South Dakota, stated that the petitioner's "contributions in hypertension research and technology [have] gained worldwide recognition" and are "crucial to decrease the prevalence of hypertension."

Indiana University [redacted] who supervises the petitioner's postdoctoral research, stated:

> Significant results have emerged from his studies that directly or indirectly assist in our fight against hypertension . . . .
>
> One of [the petitioner's] "cutting-edge" projects involves an important factor called nitric oxide . . . . Nitric oxide is important for vascular dilation, inhibition of platelet aggregation and promotion of collateral artery growth (arteriogenesis). . . . Reduced overall nitric oxide production during hypertension is expected. However, controversial results have been found in local nitric oxide levels and endothelial nitric oxide synthase levels/activity during hypertension. A key problem in this area is obtaining an accurate test of real-time nitric oxide levels in live animals . . . . [The petitioner] has been using a novel and efficient electrode method for local nitric oxide measurement without dissecting the arteries and sacrificing the animal. While these techniques are so technically demanding that they have been successfully utilized by only a few scientists in the world, [the petitioner] has mastered these techniques in less than half a year and obtained in vivo measurements of nitric oxide levels in resistance arteries of normal and

> hypertensive animals. Such in vivo measurements were not previously available and his results are the opposite of what we expected and may lead to a new paradigm for the impairment of collateral growth in hypertension.
>
> Another area of [the petitioner's] research is oxidative stress in hypertension, which is intimately related to his nitric oxide study. The overproduction of free radicals causes oxidative stress, which can directly decrease the level of nitric oxide, endangering vascular function . . . . [The petitioner] found the upregulation of the enzymes that produce superoxide in one of the hypertensive models during his PhD. study. Besides he also discovered that antioxidant enzymes decrease in the same model . . . . He is beginning to use peroxide selective electrodes to obtain measurements of oxidative stress at the arterial wall in vivo. Although peroxide is believed to have an essential role in hypertension, the levels of arterial peroxide are controversial and in vivo measurements for the resistance vessels are not available. Thus, [the petitioner's] pioneering work is of great importance to hypertension research.

Indiana University [redacted] stated: "I can attest that [the petitioner] has made great advances in understanding hypertension . . . . His profound discoveries are unlocking doors leading to improved therapies for the millions of patients who suffer from this terrible disease."

Three independent letters accompanied the initial filing of the petition. [redacted] of the Medical College of Wisconsin stated:

> [The petitioner] has a novel approach to hypertension research focusing on the adenosine receptor as a target for inhibiting the role the kidney plays in hypertension. He has also shown an important new role for nitric oxide in modulating the effect of pro-hypertensive hormones on kidney function . . . . I believe that his discoveries in this area will revolutionize the scientific community's ability to make further advances in this field.

[redacted] of Texas A & M University called the petitioner's work "innovative and intriguing" and stated: "Because of [the petitioner's] outstanding past record, he presents himself as one of the most promising scientists in this field."

Drake University [redacted] stated:

> Though I have not worked with him, I know about [the petitioner's] work through his excellent research papers that are well known and respected in our field. . . .
>
> [The petitioner's] works have resulted in some novel and potentially significant observations. He focused on a selective adenosine receptor antagonist which can improve renal function without affecting renal blood flow. . . . [The petitioner's] work and insights . . . have fundamental implications for understanding the mechanistic

> pathways of cardiovascular diseases with elevated levels of aldosterone such as obesity-induced hypertension and the metabolic syndrome.

The petitioner's initial submission included one peer-reviewed journal article (arising from the petitioner's work at the University of South Dakota) published in 2006 and three conference presentation abstracts. The petitioner did not indicate the extent, if any, to which other researchers had cited the petitioner's published work, nor did the petitioner establish that his work with hypertension had produced any full-length published articles.

On December 5, 2007, the director issued a request for evidence, instructing the petitioner to submit evidence that other researchers have cited the petitioner's work in their published research. In response, the petitioner submitted copies of two articles from 2007, each citing the petitioner's previously submitted 2006 article. The petitioner also submitted additional witness letters.

[redacted] of the University of California at San Diego stated:

> Although I do not know him personally (we never met before), I read [the petitioner's] paper and cited his paper in my own work, published in Kidney Blood Press Res. 2007 . . . .
>
> [The petitioner's] article . . . prompted us to investigate both the hemodynamic and tubular functions in the kidney during the interaction of [A1 receptor antagonist and carbonic anhydrase inhibitor]. Thus you can see that [the petitioner's] research has had a substantial and beneficial impact on his field at large.

[redacted] of the University of Pittsburgh stated: "Although I do not know [the petitioner] personally, I became aware of his research and have read his adenosine paper. I foresee that his ongoing research will positively impact U.S. biomedical research efforts, particularly in the area of hypertension treatment."

[redacted] of the University of Missouri-Columbia stated that the petitioner's "work has led to important contributions in fighting cardiovascular disease."

[redacted], who served on the petitioner's doctoral thesis advisory committee at the University of South Dakota, stated that the petitioner's "research has led to tremendous strides for U.S. biomedical research efforts in the treatment of [hypertension and related] diseases."

The director denied the petition on March 14, 2008. In the decision, the director found that the petitioner's occupation possesses substantial intrinsic merit and national scope. The director also acknowledged the petitioner's submission of "independent testimonial letters," but found that the petitioner's "ability to significantly impact the field *beyond* his colleagues and current employer has not been demonstrated." The director noted that the petitioner had submitted only one published article,

with only two citations, and found that this evidence did not establish more than a minimal impact on the field.

On appeal, counsel asserted that the petitioner submitted "highly complimentary **independent testimonials**" from witnesses who "comment[ed] on how **their own research has benefited as a result of Petitioner/Appellant's research**" (counsel's emphasis). Counsel asserts that these letters establish that the petitioner's "work has had . . . more than just 'some degree of influence' on his field as a whole" (counsel's emphasis). The director and the AAO have considered the witness letters in the record. Certainly, a number of witnesses have been highly complimentary toward the petitioner and see great value in his work, but the record does not establish that the petitioner has significantly affected the direction of research in his field. The discussion often focuses on "potential" or "promise" rather than tangible results that significantly exceed those of others in the petitioner's field. Other researchers concentrate on the petitioner's mastery of specialized laboratory technology which, while difficult, the petitioner himself did not invent or significantly modify. Mastery of technology invented by others may be an attractive feature to a potential employer, but it is not by itself grounds for a waiver. *See Matter of New York State Dept. of Transportation* at 221 and 221 n.7.

Regarding the petitioner's minimal publication and citation record, counsel states:

> [S]uch a standard fails to take into account factors such as how long the alien beneficiary has been working in the field, how many publications (if any) have been made, and how long the published work has been available to the scientific community.
>
> In the immediate case, Petitioner/Appellant had only received his PhD less than half a year prior to the I-140 filing . . . , and his work had only been published in a journal the year before this filing. . . . On that basis it is unreasonable to expect that his work would have been cited extensively.

Counsel seems, here, to imply that a researcher at the outset of his or her career should be held to a lower standard than a more experienced researcher, because the younger researcher has had less time to influence his or her field. This argument is untenable. The petitioner, not USCIS, determined the timing of the petition. If a petitioner chooses to file a petition at a time when the alien has made only a small number of contributions to the field, then the burden is on the petitioner to establish the significance of that small number of contributions. Counsel's evident concession that the petitioner has barely had enough time to influence his field supports, rather than refutes, the grounds for denying the petition.

Also, a more experienced researcher does not necessarily become more eligible for the waiver simply by virtue of being more experienced. In any case, the determining factor is the amount of impact that the alien has had, through whatever volume of work that the alien has produced. Here, the petitioner has shown that his work has attracted some attention from independent researchers, but the waiver does not instantaneously become available the moment an independent researcher takes notice of the petitioner's work. It cannot suffice simply to show outside attention to one's work; the degree

and extent of that attention are crucial factors. Here, the petitioner has focused not on the extent of his influence, but on the very existence of a small amount of influence.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.